United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2655

To be argued by
DAVID L. BIRCH

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 74-2655

UNITED STATES OF AMERICA ex rel.
ALFRED LEWIS,

Petitioner-Appellant,

-against-

ROBERT J. HENDERSON, Superintendent
of Auburn Correctional Facility,

Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
NEW YORK

BRIEF FOR RESPONDENT-APPELLEE

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BRIEF FOR RESPONDENT-APPELLEE

Preliminary Statement

Petitioner-Appellant appeals from a decision of the United States District Court for the Northern District of New York (Port, J.) denying without a hearing petitioner-appellant's application for a writ of habeas corpus. On December 19, 1974, this Court granted petitioner-appellant a certificate of probable cause and assigned counsel.

Questions Presented

Did the District Court properly deny petitioner an Evidentiary Hearing?

Do the totality of the circumstances demonstrate that petitioner's confession was voluntary?

Statement of Facts

A. State Court Proceedings

Petitioner-appellant ("petitioner") is presently incarcerated in the West Street Detention Center awaiting trial on bank robbery charges. From September 24 to November 29, 1974 he had been at the Bayview Correctional Facility, New York, New York, pursuant to a conviction in the Bronx County Court, after a trial by jury, on November 25, 1958, of robbery in the first degree, grand larceny in the first degree, and assault in the second degree. He was sentenced by the Court (McCaffrey, J.) to a term of from 30 to 60 years.* The conviction was affirmed by the Appellate Division, 10 A D 2d 924, 202 N.Y.S. 2d 1001 (1st Dept., 1960), and leave to appeal to the Court of Appeals was denied on July 15, 1960.

An application for a writ of habeas corpus was denied on November 10, 1969 (Sarafite, J.) and affirmed in 34 A D 2d 736 (1st Dept., 1970). Leave to appeal to the Court of Appeals was denied on June 15, 1970.

*Pursuant to a 1972 amendment to the Correction Law, § 212-a, petitioner became eligible for parole after serving 8 years and 4 months. Petitioner met the Parole Board for the first time in September, 1972 and, until his new arrest, was due to meet it again in March, 1975.

A post-trial Huntley hearing was held by the Supreme Court, Bronx County (McCaffrey, J.). The Court found petitioner's confessions made voluntarily in a decision dated March 24, 1970. The decision was affirmed by the Appellate Division, 35 A D 2d 1086 (1st Dept., 1970). Leave to appeal to the Court of Appeals was denied on December 15, 1970.

An application for a Huntley re-hearing was denied by the Supreme Court, Bronx County (McCaffrey, J.) in a decision dated March 15, 1973. Leave to appeal to the Appellate Division was denied on May 8, 1973.

B. Federal Habeas Corpus Proceedings

Petitioner's first application for a writ of habeas corpus was brought in the United States District Court for the Western District of New York. In a decision dated June 28, 1971, the Court (Curtin, J.), after a study of the trial record, the record of the Huntley hearing and the briefs and other records of trial and appeal, found that petitioner's confession was made voluntarily. This Court denied a certificate of probable cause on May 1, 1972. The United States Supreme Court denied certiorari on December 4, 1972.

This application for a writ of habeas corpus was brought in the United States District Court for the Northern

District of New York. An extensive brief in support of the petition was filed by the Cornell Legal Assistance Project. The Court (Port, J.) found, inter alia, that the petitioner's confession was neither mentally nor physically coerced.

C. The Crime

On February 6, 1958, in the middle of the day, a bank in the Bronx was robbed by a man wielding a gun. The facts surrounding this crime, of which petitioner was convicted, were testified to in the course of the trial. The petitioner handed shopping bags to the bank manager and a woman customer and ordered them to fill the bags with money. Petitioner then grabbed an invalid thirteen year old by the neck and left the bank with her, her three year old sister and her mother. He fled alone.

D. Pre-trial Proceedings

Petitioner was arrested at approximately 8:30 p.m. on February 17, 1958 on the complaint of Elizabeth Waller, a friend of the petitioner's since he was a child (T. 275).* Petitioner had threatened Mrs. Waller if she did not produce $1700 he claimed was missing from a brief case of money that he had left with her several days after the robbery (T. 278, 283, 296).

*Numbers in parenthesis refer to Trial transcript, part of petitioner's exhibits.

Petitioner was arraigned on February 19, 1958 at 10:00 a.m. (T. 378). Petitioner testified on a voir dire at trial that he did not tell the Magistrate that he had been physically abused, although he claimed to have told an unidentified correction officer in the bullpen that he was not feeling well and that he had been hit (T. 421).

Petitioner, usually accompanied by an attorney, appeared in Court approximately 21 times before the start of his trial.* Not until his third time in Court, on February 28, 1958, some 10 days after his confession, did petitioner request a physical examination which was ordered by the Court (Minutes of February 28, 1958, pp. 2, 6).

On March 19, 1958, petitioner's attorney requested that petitioner be committed to Bellevue for a psychiatric examination because his mother felt that he had been uncooperative with his family (Minutes of March 19, 1958, p. 3).

On March 21, 1958, the Court Clerk stated that a report had been received from Bellevue. (Minutes of March 21, 1958, p. 5). At no time was this report ever introduced by petitioner or his counsel, not at any time before trial nor at

*The minutes of these proceedings are part of petitioner's exhibits.

trial when petitioner testified to the allegedly coerced nature of his confession nor at the subsequent Huntley hearing.

Petitioner made various pro se motions throughout this period. On April 21, 1958, he moved to inspect the Grand Jury minutes. On May 1, 1958 he demanded a receipt for his money and property and moved that the prosecution submit all the evidence that it planned to use at trial. On May 10, 1958, petitioner made several motions, among them a demand for a bill of particulars, which was granted. (Minutes of May 19, 1958, p. 11). Throughout these court appearances before three judges, from February to November, 1958, petitioner made no mention of any coercion except for the one time he requested a physical examination.

On May 26, 1958 the Court committed the petitioner to Bellevue for a second psychiatric examination because the first report had diagnosed the defendant as suffering from "a severe character disorder of the schizoid type". (Minutes of May 26, 1958, pp. 4-5). On August 12, 1958, the Court stated to petitioner's attorney William Kunstler who represented petitioner at trial:

> "You realize that the psychiatrists contend that he is not in such a state of idiocy, imbecility or insanity as to be incapable of understanding the charge, indictment, proceedings or of making his defense. Do you wish to controvert that report?"

Mr. Kunstler replied, "I do not, your honor". (Minutes of August 19, 1958, p. 2).

On November 11, 1958, an information of petitioner's prior criminal record was presented. Petitioner was found to have been convicted of the crime of robbery in the second degree by the Court of General Sessions, New York County (Mullen, J.) on January 7, 1953.

E. The Trial

The trial started on October 6, 1958. The first witness, Harry Viseltear, Branch manager of the bank, identified the defendant as the robber (T. 15). On cross-examination, he testified that he had two good looks at the petitioner during the course of the robbery (T. 45) and had identified the petitioner at the station house some three to four weeks after the crime (T. 38).

The next witness was Frances Kleber, the invalid thirteen year old whom petitioner had seized by the neck at the bank. She testified that she noticed in the bank that the robber had a triangle shaped space between his two front teeth (T. 102) and identified the petitioner as the perpetrator of the crime (T. 106). On cross-examination, she testified that she looked at the petitioner four times in the bank (T. 120) and twice at the station house (T. 118-19, 125).

Petitioner was also identified by Alice Kleber, the mother of Frances (T. 142) who stated she looked at the petitioner seven or eight times during the robbery (T. 164); Fannie Bachenheimer, the woman ordered to pick up the money from the tellers (T. 168); Arthur Gruttner, a laundryman (T. 185) who stated he saw petitioner's entire face four or five times during the robbery (T. 191); Charles Calabrese (T. 206), a teller, who observed the entire robbery (T. 205-06) and who identified the petitioner in a lineup with three other blacks (T. 215); and Robert Schneider (T. 246), a teller, who also identified the petitioner in a lineup composed of four light skinned Negroes, like petitioner, and all similarly dressed (T. 249-50).

Aaron Goldberg, another teller, testified that he identified two $5 bills at the police station that had been taken during the robbery. He could identify them because he had put two distinctive marks on the bills after counting his cash (T. 230-32).

Mrs. Waller then testified to petitioner's threat against her which had led to petitioner's arrest. (See p. 4 above). She also testified that petitioner had counted the

money in the briefcase he had left with her several days after the robbery and that there had been $6300 (T. 278, 290).

Detective Vincent L. Beckles, of the 30th Squad, Manhattan, testified that between 8:00 and 8:30 p.m. on February 17, 1958 he apprehended the petitioner on the complaint of Elizabeth Waller (T. 322, 324). He stated that someone else had questioned the petitioner at the 30th Squad with respect to the robbery (T. 337) and that he had no knowledge of the petitioner's having been beaten there (T. 338). He delivered the defendant to the 42nd Squad in the Bronx at 1:00 p.m. on February 18, 1958. After the petitioner agreed to show him where the money was hidden, Detective Beckles, Detective Cook, also black, the petitioner and a friend of petitioner retrieved the money (T. 326, 367).

The detective was present during all of the questioning in the Bronx (T. 338) and no one struck the petitioner (T. 340).

Detective William Corbett, of the 42nd Squad, Bronx, testified that to his knowledge there was no interrogation of the petitioner at the 30th Squad in Manhattan (T. 347). He

testified that the petitioner was interrogated in the Bronx from 1:00-2:00 p.m. with Detectives Corbett, Beckles, Cook and Carey present (T. 350) on February 18 and then from 3:30-3:40 p.m. at which time the petitioner was both standing and sitting. At about 3:40 p.m., petitioner was taken into a room with Inspector Walsh, several members of the FBI, Detectives Corbett and Beckles and Lieutenant Weldon (T. 348).

Food was brought to the petitioner in the morning of February 18, and Detective Corbett thought petitioner ate it (T. 350). At the questioning between 3:30 and 3:40 on February 18, the petitioner was not beaten. Nor did Corbett use profanity or threats although he promised to help the petitioner in court (T. 350-51, 379). When Detective Corbett told the petitioner that he could be positively identified, that the witnesses could quote him word for word, that Frances Kleber could identify him down to the gap between his teeth, and that he could not see the little girl as he had requested (T. 353, 370, 381-82), and quoted to him what he, the petitioner, had stated at the robbery (T. 371), petitioner confessed. The detective also told the defendant that he had to

trust someone (T. 371) and that he would help him when he got to court (T. 381). He also stated that he did not know if petitioner had slept the previous night (T. 382).

The next witness was Patrolman Archibald Sheppard who testified to finding a stolen car which matched the description of the car petitioner stated he used for the robbery and which had been broken into in the manner in which petitioner described (T. 383-97).

The petitioner then testified on voir dire about the nature of his confession. He testified that after his arrest between 8:30 and 9:00 p.m. on February 17, 1958, Detectives Beckles and Corbett and an inspector hit him in the face and stomach and then took him to his room and beat him again (T. 399, 401). He stated that during the ten minutes that Detective Corbett questioned him on the afternoon of the 18th, he was held by one detective while Detective Corbett hit him in the stomach (T. 407). He stated that although he had some candy bars on the 18th, he had no solid food until the night of the 19th (T. 409-10).

On cross-examination, he admitted that at his arraignment on the morning of February 19, he did not tell the Magistrate that he had been hit (T. 421) although he claimed that he told a correction officer in the bullpen that he was not feeling well and that he had been hit (T. 421).

Petitioner did not testify to any mental coercion or to any history of psychiatric troubles. His attorney, Mr. Kunstler, did not introduce any psychiatric report and called no witnesses except for petitioner who testified only on voir dire about his confession.

The next witness was Dr. Joseph Karpowski, a physician at the Bronx House of Detention (T. 427). He examined the petitioner on February 19, 1958, the day petitioner alleges he complained to a correction officer. Petitioner made no complaints to the doctor (T. 431). No red marks were found on petitioner's abdomen (T. 432). On February 26, 1958, petitioner complained to the doctor of pains in the chest and back which he stated resulted from the beating of February 17. On February 28, petitioner complained of pain in the upper lumbar region and hematuria which had disappeared

by March 1 (T. 464). Petitioner then complained on March 3 of pain between the perineum and epigastrium but no objective findings were made (T. 465-67). No signs of bone fracture or dislocation were found (T. 477-78).

The last witness was Francis Dessereau, the stenographer who took down petitioner's confession on February 18 between approximately 3:45 to 4:30 p.m. (T. 516). He read petitioner's confession (T. 519-528). He testified that while taking down the confession he was from 3 1/2 to 4 feet from the petitioner and looked at him for about half of the time he was taking stenographer notes. Petitioner was not in any way upset, and the witness noticed no marks on his face (T. 531).

The defense rested having produced no witnesses except the petitioner on a voir dire to contest the voluntariness of his confession. Petitioner did not otherwise take the stand. No evidence of mental incapacity was put in issue.

The Court instructed the jury that the confession could not be considered if made under the influence of fear produced by threats or a stipulation by the District Attorney that he

would not be prosecuted as a result of it (T. 654). The jury was instructed that the confession must be voluntary and not the product of a third degree (T. 655) and must be the product of a free choice (T. 658).

The jury returned a verdict of guilty.

F. The Post-Trial Huntley Hearing

At the hearing held in January, 1970 in the Supreme Court, Bronx County, before Justice McCaffrey, the People introduced the trial testimony of Detectives Corbett and Beckles and the petitioner and rested (HM 33).*

The petitioner chose not to take the stand. His attorney stated that the petitioner requested him to state that the transcript relates "to all of the pertinent parts that have to do with the voluntariness or involuntariness of his confession" (HM 35).

*Numbers preceded by HM refer to Minutes of the Huntley Hearing, included as part of petitioner's exhibit.

Louis Johnson testified for the petitioner. Johnson had been convicted for policy and possession of a hypodermic needle (HM 52), and in February, 1958 had not seen the petitioner for five years (T. 53-54). He stated that on February 17, 1958 he had been at the 30th Squad in Manhattan for three or four hours (HM 47) where he heard loud conversation between the petitioner and others (HM 48). Apparently by coincidence, Johnson, too, was then taken to the 42nd Squad where he claimed that he saw the petitioner lying on the floor (HM 48) and saw the petitioner pushed and hit in the stomach (HM 49).

Joseph Jones, with six convictions for petty larceny (HM 105), also testified for the petitioner. He claimed to be the friend who went with the petitioner to retrieve the money (HM 100) and testified that he saw the petitioner at the 42nd Squad lying on the floor in pain and saw him in a dragging position (HM 101, 103).*

Petitioner and his attorney presented no other witnesses and no evidence of mental coercion.

*Testimony at trial indicated that the friend accompanying petitioner to retrieve the money ~~did not meet him until petitioner and the detectives arrived at the building where the money was hidden~~. was brought to the 42nd precinct at petitioner's request (T397, 405) and thus was not arrested as Jones claimed he was. (HM 98)

In rebuttal, the People presented Detectives Corbett and Beckles.

Detective Beckles testified that he arrested the petitioner at 8:30 p.m. on February 17, 1958 (HM 58). He was present at the 30th Squad in Manhattan, where petitioner had been brought during the entire time petitioner was there except from 3:30 a.m. to 6:30 a.m. on February 18 (HM 58-59). On the night of February 17, petitioner was let into the dormitory for 15-45 minute intervals and not prevented from using the beds (HM 68- 69).

At 11:30 a.m. on February 18, Detective Beckles, Corbett and Alfano and petitioner left for the 42nd Squad in the Bronx (HM 60). He spoke with petitioner for 15-30 minutes at the 42nd. He testified that no hand was laid on defendant by anyone and that no one beat petitioner (HM 61, 62).

Detective Corbett testified that food was brought to the room where petitioner was at the 30th Squad in Manhattan (HM 73a). He testified that he questioned the petitioner at the 42nd Squad when petitioner arrived with Detectives

Beckles and Cook present (HM 74). Immediately before petitioner confessed, Detective Corbett told him that his luck had run out and that he had been identified even as to the gap between his teeth (HM 75, 76). He stated that no physical coercion had taken place and that when petitioner left the 30th Squad to be transported to the Bronx, he had skipped over a snowbank and his eyes were not bloodshot (HM 77).

Petitioner's attorney put the alleged mental coercion into issue at the close of the argument. He alleged that the delay in arraignment, the supposed protracted incommunicado interrogation, and not being advised of his Fifth and Sixth Amendment rights resulted in an inherently coercive atmosphere (HM 88-89).

The extensive findings of the Court are provided in Exhibit D of petitioner's appendix. It found that the testimony of the detectives and doctor was credible and that petitioner's was not. It found that either Detective Corbett or Detective Beckles was with petitioner almost the entire time between arrest and the confession and that petitioner was not beaten. It held that petitioner's confession was made voluntarily.

Even though the Court's final statement was phrased in terms of physical coercion, the Court made other findings relevant to petitioner's instant claim of mental coercion. Thus, the Court found that petitioner was accompanied by a friend when he went with the detectives to retrieve the money (Petitioner's appendix, p. 60), that Detective Corbett used no profanity and made no threats and molested petitioner in no way (Petitioner's appendix p. 60). The Court also found that petitioner appeared to be in good mental and physical condition on February 18 at the time he was transferred from the 30th Squad to the 42nd Squad.

Argument

THE DISTRICT COURT PROPERLY DENIED AN EVIDENTIARY HEARING. IN ANY EVENT, THE TOTALITY OF THE CIRCUMSTANCES DEMONSTRATE PETITIONER'S CONFESSION WAS VOLUNTARY

I

Petitioner's argument is essentially that the facts exist as he stated them and that therefore his confession was a product of mental and physical coercion. However, he was not established by convincing evidence that the factual deter-

mination of the Huntley Hearing was erroneous. United States ex rel. Cronan v. Mancusi, 444 F. 2d 51 (2d Cir. 1971); United States ex rel. Coleman v. Mancusi, 423 F. 2d 985 (2d Cir. 1970). The record here is sufficient to justify the Huntley court's factual determinations. United States ex rel. Caster v. Mancusi, 414 F. 2d 743 (2d Cir., 1969).

Justice McCaffrey, in his decision after the post-trial Huntley Hearing found that petitioner's confession was made voluntarily and was not physically coerced. Petitioner alleges that since he did not explicitly state that his confession was not mentally coerced that he should be granted a new hearing on that issue. Justice McCaffrey made specific findings that are relevant to mental coercion. Before petitioner confessed, he was accompanied by a friend when he went with the detectives to retrieve the money. This episode demonstates that petitioner was not held incommunicado. No evidence was ever introduced that petitioner requested to see anyone other than the friend who accompanied him to retrieve the money. The Court also found that the detective who questioned petitioner immediately preceding his first confession did not use profanity, made no threats and molested petitioner

in no way. The Court found that when petitioner left the 30th Precinct to go to the 42nd after allegedly being beaten all night, petitioner was able to skip over a snow bank and that his eyes were not bloodshot.

Petitioner's only evidence is his own highly colored version of events testified to on voir dire at trial, since he did not take the stand at the Huntley Hearing, and the testimony of two "friends" given twelve years after the fact rather than at the trial -- two friends who by some chance of fate allegedly were in the same precincts as petitioner, one of whom allegedly was in both precincts on those two days in February, 1958. Petitioner was represented by counsel at trial and at the Huntley Hearing. He now alleges that the prosecutor had the burden of producing every conceivable police officer who witnessed his every movement on February 17 and 18, 1958, yet neither of petitioner's counsel attempted to present any of these elusive witnesses. The testimony of the prosecution's witnesses was sufficient to prove the confession voluntary beyond a reasonable doubt, notwithstanding the fact that the State's burden is met in the federal habeas court when it demonstrates by a preponderance of the evidence that the confession was voluntary. Lego v. Twomey, 404 U.S. 477 (1972).

Petitioner attempts to make much of his supposed schizophrenia. Yet neither counsel bothered to introduce the Bellevue report. In fact, uncertain about that report, Judge Lyman, who presided neither at the trial nor at the Huntley Hearing, recommitted petitioner. (Minutes of May 26, 1958, pp. 4-5.) On August 19, 1958, after that second examination at Bellevue, Judge McCaffrey, who did preside at the trial and the Huntley Hearing, stated to petitioner's trial attorney, Mr. Kunstler, that he was not incompetent to stand trial. Mr. Kunstler responded to the Judge that he did not wish to contest that report. (Minutes of August 19, 1958, p. 2.)

Petitioner implies in his brief that Dr. Karpowski, who testified at trial, had put into his medical report the mental diagnosis of petitioner. However, examination of the record demonstrates that all that had gone into the doctor's report was that the petitioner had returned from Bellevue where he had been hospitalized for mental observation from March 19 to March 27, 1958 (T. 477-78).

Petitioner claims that he was without food and sleep from the evening of February 17 until February 19. Yet the two detectives who were most involved with the case and who testified at trial and the Huntley Hearing stated that food was brought into the room where petitioner was and that he was

left in the dormitory for several periods of up to 45 minutes each during the night of February 17 (HM 68-69).

Petitioner's claim that he was beaten was explicitly denied by the decision of the Court after the Huntley Hearing. The record demonstrates that the two detectives who were with him almost the entire time from arrest to confession testified that he was not beaten. (T. 338, 340, 350-51, HM 61, 62, 77). Petitioner admitted that he did not complain to the arraigning Magistrate (T. 421) nor did he complaint to Dr. Karpowski when the doctor first examined him on February 19 (T. 431), the day that petitioner alleges he complained to an unidentified correction officer in the bullpen at the arraignment court. Not until seven days later did petitioner make any complaint to the doctor (T. 464) when he could have seen the prison doctor at any time during those intervening seven days. When the complaint of pain was made, the doctor was able to make no objective findings of injury (T. 465-67, 477-78).

The stenographer who took down the confession directly after the alleged beatings testified at trial that petitioner was not upset at the time the written confession

was taken and that although the stenographer was only a few feet from the petitioner and watching him for approximately half of the forty-five minutes the confession took, the stenographer saw no marks on the defendant (T. 531).

Petitioner claims that he attempted to produce Inspector Walsh to testify. Petitioner had an eminent trial attorney and counsel at the Huntley Hearing. Trial counsel had five months to prepare for trial. The Huntley Hearing was postponed several times so petitioner's two witnesses could appear. Neither attorney saw fit to produce the Inspector.

Petitioner alleges that the confession was tainted by allegedly illegal identifications. He alleges in his brief that at least some of the witnesses were at the stationhouse viewing the petitioner simultaneously. The pages of the trial transcript to which he cites to prove this statement (T. 115, 157, 160, 161) all contain the testimony of Alice Kleber, who obviously was at the stationhouse with her daughter, Frances, who also testified at the trial. Two of the witnesses identified the petitioner at a lineup with three other similarly dressed and similarly complexioned individuals (T. 215, 249-50).

Harry Viseltear, the bank manager, testified that he viewed the petitioner some three to four weeks after the robbery (T. 38). The confession was made twelve days after the robbery.

Petitioner alleges that promises and deceptions were used on him. Granted, he was told that the detective was his friend and would help him in court, but he was never promised that the evidence would not be used against him (T. 350-51, 379).

It is clear from the record and the findings of the Huntley court that when confronted with the fact that he could be identified even as to the gap between his front teeth, and that Detective Corbett even knew the words he used during the robbery, that petitioner decided to confess. Petitioner was no stranger to the criminal courts having been convicted of robbery in the second degree when he was seventeen.

Petitioner appeared in court on February 19 and February 25. Neither time did he request a physical examination or claim that he had been beaten. Yet throughout the pre-trial period he was quite vociferous in defense of his rights. He was examined by a prison doctor on February 19 and made no mention of physical injuries. He had access to the

doctor on each day after February 19, yet he made no request to the Court for a physical examination until February 28, the date of his first complaint to the doctor. It is apparent that at some time between February 25 and February 28, petitioner "realized" that his confession had been coerced. This was approximately the same time that petitioner was identified by Mr. Viseltear.

II

It must also be assumed that the Huntley Hearing court would have found petitioner's confession involuntary had it believed his allegations. LaVallee v. Delle Rose, 410 U.S. 690 (1973). Petitioner's attorney did raise the issue of mental coercion at the Huntley Hearing. Although the Cou . in its decision after the Huntley Hearing did not present an exegisis of Constitutional law, it must be assumed that the correct standards of federal law were applied to the facts, since it decided not to exclude petitioner's confession. Townsend v. Sain, 372 U.S. 293 (1963). No new evidentiary hearing is required under 28 U.S.C. § 2254(d) or Townsend v. Sain, supra, since petitioner has not demonstrated any of the required showings.

When provided an opportunity at the Huntley Hearing to take the stand and testify to alleged mental and physical coercion, even after hearing Detectives Beckles and Corbett testify, petitioner elected not to do so. See United States ex rel. Cerullo v. Follette, 416 F. 2d 156 (2d Cir. 1969), cert. den. 397 U.S. 1000. He should not be heard to complain now of not being provided a full and fair hearing.

Petitioner's subjective evidence of pain is a question of fact for the Huntley court in light of the fact that there were no objective findings of injury after examination by Dr. Karpowski. United States ex rel. Cerullo v. Follette, supra.

The State court's findings are, at the least, supported by the requisite preponderance of the evidence. Lego v. Twomey, supra.

III

An independent inquiry reveals that petitioner's claim is without merit. Since petitioner's trial was held eight years before Miranda v. Arizona, 384 U.S. 436 (1966), the totality of the circumstances must be investigated. Clewis v. Texas, 386 U.S. 707 (1967); Davis v. North Carolina, 384 U.S. 737 (1966).

Petitioner advances numerous reasons why his confessions should be considered involuntary. He argues that he was taken into custody under false pretense since Elizabeth Waller's complaint lacked substance, even though Mrs. Waller did testify that petitioner threatened her if she did not come up with $1700 that she did not have (T. 278, 283, 296). Assuming arguendo that petitioner was taken into custody under the false pretense he alleges, his argument is without merit. It is well settled that, absent a showing of involuntariness violative of due process, the illegality of a detention does not make pre-arraignment statements per se inadmissible. United States ex rel. Clinton v. Denno, 309 F. 2d 543 (2d Cir. 1962), cert. den. 372 U.S. 938 (1963); United States ex rel. Rosner v. Warden, 329 F. Supp. 673 (E.D.N.Y. 1971).

It is also well settled that mere deception by an interrogator, ipso facto, does not invalidate a confession in the absence of other compelling circumstances, of which there are none here. United States ex rel. Lathan v. Deegan, 450 F. 2d 181 (2d Cir. 1971); United States ex rel. Sanney v. Montanye, 364 F. Supp. 905 (S.D.N.Y. 1973). In Procunier v. Atchley, 400 U.S. 446 (1971), the Court upheld the voluntariness of a

confession to an individual who was not a police official and which was recorded without the defendant's knowledge. The Court held that this deception did not show actual coercion or a potentionally coercive setting. Procunier v. Atchley, supra at 455. In Frazier v. Cupp, 394 U.S. 731 (1969), the Court held that a false statement to the defendant by interrogators to the effect that a co-defendant had confessed was by itself insufficient to make an otherwise voluntary confession inadmissible. The alleged deception here was much less likely to induce a confession than that of the type in Frazier v. Cupp. United States ex rel. Everett v. Murphy, 329 F. 2d 68 (2d Cir., 1964) is easily distinguished. There, police officers arrested the defendant on a "warrant" which did not in fact exist. However, the deception on which the Court focused in granting the writ was the statements by police officers to the defendant to the effect that the victim of the crime was alive when in fact he was dead, which was said to make more plausible a promise of assistance made to the defendant.

The length of time before arraignment, even when unnecessary, does not make a confession involuntary by itself. Crooker v. California, 357 U.S. 433 (1958); Stroble v.

California, 343 U.S. 181 (1952); United States ex rel. Clinton v. Denno, supra; United States ex rel. Rosner v. Warden, supra. In Clinton, the petitioner had been detained for six weeks before arraignment, while petitioner here was held under 38 hours, and the confession came 19 hours after arrest.

Low intelligence does not in itself warrant a finding of coercion, Procunier v. Atchley, supra. Petitioner here did have a ninth grade education, was familiar with the criminal process, and exhibited a certain intelligence and ability throughout the pre-trial proceedings.

Petitioner's not having counsel at the showups and lineups was not unconstitutional since the requirements of Gilbert v. California, 388 U.S. 263 (1967) and United States v. Wade, 388 U.S. 218 (1967) were not applicable in 1958. Stovall v. Denno, 388 U.S. 293 (1967). Petitioner well knew that many people had been present in the bank when he wore no disguise in broad daylight. He was of sufficient intelligence to know that he would be easily identified.

The alleged factual situation here is far from the uncontroverted facts in the cases cited by petitioner such as Blackburn v. Alabama, 361 U.S. 199 (1960)(defendant per-

manently disabled by psychosis, with competent testimony to that effect); Payne v. Arkansas, 356 U.S. 560 (1958)(no food for 25 hours; threat of mob violence); Davis v. North Carolina, 384 U.S. 737 (1966)(interrogation over a period of 16 days); Clewis v. Texas, 386 U.S. 707 (1967)(defendant sick, interrogation for 38 hours, trip to gravesite of victim, no contact with anyone but police); Culombe v. Connecticut, 367 U.S. 569 (1961)(petitioner mental defective of moron class, repeated questioning for four nights and substantial portion of five days; wife told him to confess); Haynes v. Washington, 373 U.S. 503 (1963)(defendant requested permission to call attorney and wife; told to cooperate first; held incommunicado for five to seven days); Haley v. Ohio, 332 U.S. 596 (1948) (15 year old).

Petitioner also cites Haynes v. Washington, supra, for the proposition that the trial court's alleged error in its jury charge with respect to the confession rises to the level of constitutional proportions.* Petitioner fails to recognize that in Haynes, there had been no determination of the voluntariness of the confession independent of the ultimate

*Mental coercion was not a factor at trial because the thrust of petitioner's testimony on the voir dire at trial was that his confession had been physically coerced.

issue of guilt. Here, that determination has been made by the Court in a Huntley hearing, as was proper. Jackson v. Denno, 378 U.S. 368 (1964).

A confession that results from the accused's confrontation with the reality of his situation is voluntary. United States ex rel. Lathan v. Deegan, supra; United States ex rel. Petersen v. LaVallee, 279 F. 2d 396 (2d Cir. 1960); United States ex rel. Rosner v. Warden, supra. Petitioner knew he had been identified. Detective Corbett testified that when confronted with the identification of several witnesses, petitioner was startled and then confessed. Petitioner must have been well aware of the number of people who had observed him without any disguise in broad daylight.

Petitioner has presented the same claims to the state court and two United States District Courts. This Court denied a certificate of probable cause to appeal Judge Curtin's decision. Petitioner's claims have not changed. He has not demonstrated by the preponderance of the evidence that those determinations should be changed.

CONCLUSION

THE DECISION OF THE DISTRICT COURT
SHOULD BE AFFIRMED

Dated: New York, New York
February 24, 1975

Respectfully submitted

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent

IRVING GALT
Assistant Attorney General

DAVID L. BIRCH
Deputy Assistant Attorney General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ANGELA FIORE , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellee herein. on the 24th day of February , 1975 , she served the annexed upon the following named person :

Lawrence Stern, Esq.
11 Monroe Place
Brooklyn, NY 11201

Attorney in the within entitled petitioner by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Angela Fiore

Sworn to before me this
24 day of February , 1975

David P. Bard
Assistant Attorney General
of the State of New York